

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Robert J. Imdieke, Jr.,

v.

Minneapolis Public Schools

and

James Ziebell,

v.

Minneapolis Public Schools

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came before Administrative Law Judge Eric L. Lipman for an evidentiary hearing on December 15, 2009. Following the receipt of post-hearing submissions from the parties on January 8 and 15, 2010, the hearing record closed.

JaPaul Harris, Senior Employee Relations Associate, appeared on behalf of the District. Gayle Gaumer, Wilson Law Firm, appeared on behalf of Petitioners Robert J. Imdieke, Jr. and James Ziebell.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Petitioner Robert J. Imdieke, Jr. served in the United States Air Force on active duty from October 17, 1974 to September 5, 1978. He was honorably discharged from the U.S. Air Force on September 5, 1978.¹

2. Petitioner James Ziebell served in the United States Air Force on active duty from December 9, 1966 to December 22, 1967. He was honorably discharged from the U.S. Air Force on December 22, 1967.²

¹ Exhibit A; Testimony of Robert Imdieke.

² Ex. B; Testimony of James Ziebell.

3. Petitioners were employed by the District in the classification of “electrician” on June 21, 2004. Until their separation from service on June 1, 2009, both men performed duties as electricians for the District’s Facilities Department.³

4. Both men were members of the International Brotherhood of Electrical Workers, Local 292, and were hired by the District through the Union’s hiring hall. It is the District practice to fill vacant positions in the building and construction trades by contacting trade union hiring halls. The trade unions maintain lists of union members who are seeking employment.⁴

5. Over the past 10 years the School District has suffered a 30 percent reduction in student enrollment – nearly two-thirds of which has occurred during the most recent five years.⁵

6. Since Petitioners were hired in 2004, the School District has closed, leased or sold 15 buildings.⁶

7. For Fiscal Year, 2009—2010, the District projected a \$28 million dollar budget shortfall. As part of its plan to reduce the projected deficit, the District ordered a \$10 million dollar reduction in operational expenses. The District directed all departments, including the Facilities Department, to reduce their operating budgets. Specifically, the Facilities Department was tasked with cutting its operating budget from \$16.3 million dollars to \$12 million dollars.⁷

8. To meet this directive, the Facilities Department eliminated a total of 29 positions, 26 of which were occasioned by layoff. In particular, the electrician workforce was reduced by nine employees.⁸

9. Under its layoff plan, the District retained its most senior employees in each work classification effected by layoffs, reducing by layoff those workers with less seniority. Additionally, both veterans and non-veterans were among those persons laid off and among the more senior electricians that were retained.⁹

10. There is no evidence that the past performance of any employee played a role in the decision-making as to whom to separate from service through the lay off.¹⁰

³ Exs. C, D and E.

⁴ Test. of R. Imdieke.

⁵ Testimony of Grant Lindberg; Ex. 4 at 6.

⁶ Test. of G. Lindberg.

⁷ Exs. 10 and 11.

⁸ Ex. 12.

⁹ *Id.*

¹⁰ *Compare*, Test. of G. Lindberg.

11. On June 1, 2009, the District hand-delivered to Petitioners their separation notices. The notice provided in part:

If you are an honorably discharged veteran, you may have certain rights relating to your layoff under the Minnesota Veterans' Preference Act, Minn. Stat. 197.46 ("Act"). Pursuant to the Act, you have the right to petition the District Court for a writ of mandamus, requiring reinstatement and back pay, if you think that your layoff was not in good faith. Alternatively, you have the right to petition the Commissioner of Veterans' Affairs pursuant to Minn. Stat. § 197.48 1 for a hearing to determine whether your layoff was in good faith. If you choose to take either of these actions, you must do so within sixty (60) days of receipt of this notice. Failure to timely request a hearing within this sixty (60) day period shall constitute a waiver of your rights to contest your layoff under the Veteran' Preference Act. Such failure shall also waive all other available legal remedies for reinstatement.

The District continued to pay Petitioners their regular salaries for a period of 60 days following the delivery of the separation notices.¹¹

12. When deciding whether and how to complete specific maintenance projects, among the matters that managers of the District's Facilities Department consider are: (a) the sources of funding, if any, that are available to complete the project; (b) the urgency, if any, of completing the proposed work; (c) the direct and indirect costs associated with adding a permanent employee to the District's payroll; and (d) the direct and indirect costs associated with contracting with an outside vendor for the work – including the time lags that follow from the contracting process.¹²

13. From the District's perspective, hiring an electrician who has never worked for the District before, but who has been enrolled on the Local 292 hiring hall list of unemployed electricians longer than Messrs. Imdieke or Ziebell, involves more indirect costs than recalling either Mr. Imdieke or Mr. Ziebell to work. As the District reasons, credentialing, orienting and supervising an employee who has never worked for the District before requires more resources than reintegrating a former employee.¹³

14. Local 292 would not grant the School District "recall rights" to any of the electricians who were laid off in June of 2009. Without such rights, the School District, if it sought a qualified electrician through the hiring hall process, would be obliged to offer employment to the union member who had been on the hiring hall list the longest.

¹¹ Exs. 17 - 20.

¹² *Id.*

¹³ *Id.*

Given the number of Local 292 members who hope for such work, the District would not likely reach either Mr. Imdieke or Mr. Ziebell for many years.¹⁴

15. As the District found sources of funding for specific pipefitting and painting projects, it recalled one painter and seven pipefitters who were laid off earlier in 2009. While this appeal was underway, however, the pipefitters who were briefly recalled to work were laid off a second time.¹⁵

16. Since June 1, 2009, the District has not employed an electrician with less seniority than either Mr. Imdieke or Mr. Ziebell.¹⁶

17. The District has executed two contracts under the State of Minnesota's Master Professional / Technical Services Contract program for the repair of ballast boxes and other short-term electrical maintenance projects. Under the contracts, District officials collect and prioritize a series of electrical-related work order requests, and from time to time, issue these tasks as a bundle to teams of electricians. These teams are comprised of contractor employees and one or more of the remaining electricians from the Facilities Department. While the each of these contracts permit up to \$25,000 to be spent in completing assigned work, the District has spent less than half of this amount on such projects to date.¹⁷

18. Rather than incur the expense of adding full-time employees to the Facilities Department, or increasing the amount spent under either of the existing Master Professional / Technical Services Contracts, the District prefers to defer electrical maintenance work that it regards as a lower priority.¹⁸

19. Petitioners timely appealed their respective discharges from employment with the Department of Veterans Affairs.¹⁹

20. Following the Department's issuance of Notices of Petition and Orders for Hearing in the respective cases, the matters were combined into a consolidated proceeding.²⁰

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

¹⁴ *Id.* Test. of J. Ziebell.

¹⁵ *Id.*

¹⁶ Test. of G. Lindberg.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See, *Notice of Petition and Order for Hearing*, OAH Docket Nos. 8-3100-20637-2 and 8-3100-20638-2 (June 30, 2009).

²⁰ *Second Pre-Hearing Order*, OAH Docket Nos. 8-3100-20637-2 and 8-3100-20638-2 (August 17, 2009).

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481.

2. The parties received proper notice in this proceeding and this matter is, therefore, properly before the Administrative Law Judge.

3. Petitioners are honorably discharged veterans within the meaning of Minn. Stat. §§197.46 and 197.447 of the Veterans Preference Act.

4. Minn. Stat. §197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing.

5. Public employers may abolish positions held by veterans notwithstanding the Veterans Preference Act, if the abolition is in good faith.²¹

6. The burden of proof is upon Petitioners to prove by a preponderance of the evidence that either or both were removed from public employment without a hearing. Once a removal is established, the burden of proof is upon the employer to prove by a preponderance of the evidence that the veteran's position was abolished in good faith.²²

7. Petitioners were removed from their positions as electricians with the facilities department of the School District within the meaning of Minn. Stat. §197.46.

8. Petitioners' removal were not for reasons of incompetency or misconduct as those terms are defined by Minn. Stat. §197.46.

9. Petitioners' removal from their positions as electricians with the Facilities Department was the result of the District's good faith decision to affect a reduction in force.

10. Petitioner's veterans preference rights under Minn. Stat. § 197.46 were not violated by the District because Petitioners' removal followed from the District's good faith decision to match workload with available revenues.

11. The District provided Petitioners with the procedural and substantive rights to which they were entitled.

²¹ See, *Young v. City of Duluth*, 386 N.W.2d 732, 738 (Minn. 1986).

²² See, Minn. R. 1400.7300, subp. 5 (2007); compare generally, *Holmes v. Board of Commissioners of Wabasha County*, 402 N.W.2d 642, 644 (Minn. App. 1987).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

It is respectfully recommended that the Commissioner of Veterans Affairs DENY the petitions of Robert J. Imdieke, Jr. and James Ziebell.

Dated: February 9, 2010

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Commissioner of Veterans Affairs, Veterans Service Building, Minnesota Department of Veterans Affairs, 20 West 12th Street, Second Floor, St. Paul, Minnesota 55155-2006, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

At issue in this case are the measures that a local unit of government may take, under the Veterans Preference Act, in response to lower revenues. Specifically, may the District: (a) lay off employees who are covered by the protections of the Act; (b) perform some, but not all, of the types of work performed by the veterans who were laid off; and (c) use a mix of more senior employees and outside contractors to accomplish the reduced duties?

The case of *Winkelman v. City of Minneapolis*, suggests that the Minneapolis School District may approach the work in this way without violating the Act. In *Winkelman*, a former truck driver with the City of Minneapolis complained that following a reduction in force, the City had hired outside contractors to perform similar work. The City asserted that outside contractors were used for “peak periods” of work and only for a limited number of days during the summer construction season. As Judge Mihalchick wrote in that case:

In most cases involving the bad faith abolishment of a veteran’s position, “it generally has appeared that there was prompt re-creation of the office or position under a different name or assignment of the work thereof to another department, followed by appointment of a new appointee to perform the work formerly done by the incumbent of the office or position claimed to have been abolished.” Petitioner’s position has not been re-created under a different name. The duties being performed by private contracts are on an “as needed” basis. This is substantially different from the year-round nature of Petitioner’s position with the City. The contract work with the City does not constitute reassignment within the meaning of [*Young v. City of Duluth*,] or [*State ex rel. Niemi v. Thomas*].

....

There is no evidence that the City will be experiencing higher costs due to the layoffs through private contracting. The methodology used by the City in assessing its need for [Drivers and Operators] is reasonable on its face. There is no evidence that the process was manipulated to target Petitioner’s position. The City’s action was taken in good faith and not to oust a veteran without providing the protections of the Act.²³

Like *Winkelman*, in this instance, the School District has bundled a much smaller portfolio of work than either veteran undertook while he was employed, and is accomplishing this work through special teams of remaining employees and outside contractors. Further, as it was in *Winkelman*, the number of work days and the total amounts paid to the outside contractors do not compare to the cost of re-hiring a full-

²³ *Winkelman v. City of Minneapolis*, OAH Docket No. 12-3100-19145-2 (2007) (<http://www.oah.state.mn.us/aljBase/310019145%20rt.htm>) recommendation adopted by the Commissioner (2008) (<http://www.oah.state.mn.us/aljBase/final/310019145.pdf>).

time employee. Lastly, as with *Winkleman*, but unlike the facts in cases such as *Tamminen v. City of Eveleth*, the veterans did not establish that the government employer was using the reduction in force as a pretext to remove them from their positions.²⁴

The government is entitled to make good-faith reductions in force, discharging employees in reverse-order of seniority, including honorably-discharged veterans, without violating the Veterans Preference Act.²⁵ The Commissioner should deny the petitions of Robert J. Imdieke, Jr. and James Ziebell.

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²⁴ Compare, Conclusion Number 9, *supra* with *Tamminen v. City of Eveleth*, 249 N.W. 184, 186 (Minn. 1933) (“The same work remained to be done in that office after January 5, 1932, as before that date. Plaintiff had, as against Brandt, a preference right to be employed to do that work. As said by the court in its memorandum, ‘the law does not countenance the ousting of a soldier from an office by abolishing the name of the office just to get rid of a soldier’”).

²⁵ See, *Evens v. City of Duluth*, 262 N.W. 681, 682 (Minn. 1935) (“[T]he office here was suspended. Relator was not removed to make way for another. The [Veterans Preference Act] has no application to such a case”); *Taylor v. City of New London*, 536 N.W.2d 901 (Minn. App.) *review denied* (Minn. 1995) (“an honorably discharged veteran was not entitled to relief following the good-faith disbanding of his department”).